STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **JAMES E. ELLETT** for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1995.	DETERMINATION DTA NO. 817420

Petitioner, James E. Ellett, c/o 5171 Rt. 32, Catskill, New York 12414, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1995.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 11, 2000 at 9:15 A.M., with all briefs to be submitted by October 26, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether petitioner's wage income was subject to New York State personal income tax.

II. Whether the Division of Taxation's request for the imposition of a frivolous petition penalty pursuant to 20 NYCRR 3000.21 was proper.

FINDINGS OF FACT

1. Petitioner, James E. Ellett, filed a timely New York State resident income tax return (form IT-200) for the year 1995, with a filing status of married filing separate return. The return, as filed, reported taxable interest income in the sum of $193.29, but no wage income. Petitioner claimed the standard deduction of $5,400.00, which resulted in no taxable income and no tax due. Petitioner requested a refund of $3,253.09 which had been withheld from his wages. The wage and tax statement attached to the return showed that during 1995 petitioner was employed by Central Hudson Gas & Electric Corp. and earned wages of $52,441.10 from which New York State income tax was withheld in the sum of $3,253.09.

2. On June 6, 1996 the Division of Taxation ("Division") issued a notice and demand for the payment of tax due to petitioner for the year 1995, showing Federal adjusted gross income of $52,634.00 ($52,441.00 plus $193.00), and New York taxable income of $47,234.00 after allowance for the standard deduction. The amount of New York State income tax computed was $3,296.00, less the tax withheld of $3,253.09, leaving tax due of $42.91.

3. Petitioner signed and returned to the Division a Department of Taxation and Finance form dated July 9, 1996 wherein he indicated his disagreement with the amount of tax due and attached a written explanation of his reasoning. In his explanation petitioner distinguished between "gains and profits" which he stated were subject to income tax, and "compensation for labor" which, he contended, is not subject to income tax.

4. By notice of assessment resolution dated December 30, 1996, the Division responded to petitioner's correspondence, explaining that a person who receives wages for services rendered is required to pay income taxes on those wages. In his undated letter in response to the Division's notice of assessment resolution, petitioner denied that he had a liability for income tax

and penalties, arguing that one does not derive income by rendering services and charging for them.

5. On November 17, 1997 the Division sent to petitioner a collection notice and a consolidated statement of tax liabilities informing him that, in addition to the $42.91 tax item, he also owed penalty in the sum of $3.78 plus interest in the amount of $5.94 for a total of $52.63.

6. On January 9, 1998 petitioner mailed to the Division an unsigned form IT-201-X, Amended Resident Income Tax Return, wherein he changed the amount of the Federal adjusted gross income reported on line 1 by increasing said amount by $52,441.10 (the amount of his Central Hudson Gas & Electric Corp. wages) to $ 52,634.39. Petitioner then substituted an itemized deduction in the amount of $53,741.10 in place of the $5,400.00 standard deduction which served to reduce his New York State taxable income to zero. He then claimed a refund in the sum of $3,253.09, the amount of his New York State taxes withheld.

7. With his 1995 amended New York State return, petitioner included a copy of his 1995 form 1040-X, Amended U. S. Individual Income Tax Return, dated June 19, 1997, wherein he made the same adjustment to his Federal adjusted gross income as he made on his amended New York State return, and increased his itemized deduction from zero to $52,441.10, the amount of his wages. Petitioner then requested a refund of his Federal income tax withheld in the sum of $10,429.61. On his form 1040, schedule A, petitioner reported as a miscellaneous deduction the sum of $52,441.10, describing it as a "non-taxable compensation as per U.S. Constitution." Submitted with the form 1040-X was an Internal Revenue Service ("IRS") statement of account dated October 20, 1997 acknowledging a refund due to petitioner in the sum of $3,782.80.

8. On March 27, 1998 the Division issued to petitioner a notice of disallowance of refund, disallowing in full petitioner's claimed New York State income tax refund in the amount

of $3,253.09. This document noted that the IRS statement of account does not reflect any changes in income or deductions, only that credit was given for Federal tax withheld.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner filed a petition for a refund on November 15, 1999 wherein he stated:

> The error made by the Commissioner of Taxation and Finance or, his representative in the Taxation department, was the disallowance of compensation for labor as an excemption [sic] from income in determining taxable income.
>
> I intend to prove that compensation for labor is, under the United States Constitution and Internal Revenue Code, not taxable income because it is an excemption [sic]. Also that New York State Tax Code follows the Internal Revenue Code, and therefore compensation for labor is an included excemption [sic] in the New York State Tax Code.

10. In its answer to the petition and at the hearing the Division, *inter alia*, requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

CONCLUSIONS OF LAW

A. Tax Law § 611(a) defines New York taxable income as follows:

> The New York taxable income of a resident individual shall be his New York adjusted gross income less his New York deduction and New York exemptions, as determined under this part.

B. Tax Law § 612(a) defines New York adjusted gross income as follows:

> The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

C. IRC § 62(a) defines federal adjusted gross income in the case of an individual, as "gross income minus the following deductions: . . . ." None of the deductions listed in IRC § 62(a) include wage or salary income.

D. IRC § 61(a) defines gross income, in part, as follows:

> (a) GENERAL DEFINITION.- Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items. . . .

E. In ***Cardinalli v. Commissioner*** (39 TCM 514, ***affd*** 649 F2d 866), the U.S. Tax Court held "that the levying of an income tax on the salary received by petitioner for personal services is not unconstitutional for any reason and does not violate due process of law" (***id***., at 515). Petitioner contends that compensation for labor is exempt from income tax under the U.S. Constitution, the Internal Revenue Code and the New York State Tax Law. Petitioner bears the burden of proof in accordance with Tax Law § 689(e) to show that the income sought to be taxed is exempt from tax for any reason. Petitioner has failed to meet his burden to prove that the income received from his employer is exempt from or otherwise not subject to income tax.

F. Petitioner, while admitting in his reply brief that he was born in New York State, asserts that he is not a United States citizen because New York State is a separate, contiguous nation with respect to the United States. Petitioner reasons that since he is not a citizen of the United States, and because in Article 22 of the New York State Tax Law the Legislature adopted, for its personal income tax purposes, the provisions of the laws of the United States relating to the determination of income for Federal income tax purposes, it follows that he is subject to neither Federal nor New York State personal income tax. Section 1 of Amendment 14 to the United States Constitution reads in part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside." The record demonstrates that petitioner paid Federal income tax on his 1995 wages and is subject to New York State personal income tax on those same wages.

G. 20 NYCRR 3000.21 reads, in part, as follows:

> If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may, on its own motion or on the motion of the office of counsel, impose a penalty against such petitioner of not more than $500. This penalty shall be in addition to any other penalty provided by law, and shall be collected and distributed in the same manner as the tax to which the penalty relates.

Example (a) in the list of examples of frivolous positions reads "that wages are not taxable as income." The record is replete with examples where petitioner has advanced the premise that wages are not taxable as income, which premise is clearly frivolous.

H. The Division, in its answer to the petition, has requested that the maximum penalty for the filing of a frivolous petition be imposed. The Division further placed petitioner on notice of the existence of the frivolous petition issue in its opening statement and its closing argument at the hearing on July 11, 2000. The Division, having duly applied to the Division of Tax Appeals for a determination that petitioner has asserted a position that is frivolous and asking that a frivolous petition penalty be imposed, and petitioner having failed to establish that his position was other than frivolous, it is determined that a frivolous petition penalty is appropriate. Although I found petitioner to be sincere, he is misguided in his belief that his wages are not subject to income tax. Therefore, given the circumstances, a penalty of $250.00 is imposed pursuant to 20 NYCRR 3000.21.

I. The petition of James E. Ellett is denied. The notice of disallowance issued by the Division disallowing petitioner's claim for refund is sustained. The notice and demand is

sustained and, in accordance with Conclusion of Law "H," a penalty of $250.00 is imposed for the filing of a frivolous petition.

DATED: Troy, New York
April 05, 2001

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE